

PHAM (Migration) [2022] AATA 1090 (8 February 2022)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs KIM PHAM

VISA APPLICANTS: Mr BINH TRI NGUYEN
Ms ANH THU NGUYEN

REPRESENTATIVE: Mrs MARIA DO (MARN: 0955639)

CASE NUMBER: 1815054

DIBP REFERENCE(S): BCC2017/1815220

MEMBER: Linda Holub

DATE: 8 February 2022

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309. 211(1) of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations.
-

Statement made on 08 February 2022 at 3:11pm

•

CATCHWORDS

MIGRATION –Partner (Provisional) (Class UF) visa - subclass 309 – copy of Marriage Certificate provided – parties are validly married – applicants are currently in a genuine spousal relationship– evidence of long-term commitment to a spousal relationship – marriage is valid for the purposes of the Act– decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 309.211, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 26 April 2018 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (referred to as the visa applicant) applied for the visa on 22 May 2017 on the basis of their relationship with their sponsor, the review applicant.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(1) because the delegate considered that the evidence and information provided in support of the application were not sufficient to demonstrate that the applicant is the spouse of the sponsor.
4. The review applicant appeared before the Tribunal on 30 November 2021 to give evidence and present arguments.
5. A second hearing was held by video on 19 January 2022 through the Microsoft Teams held during the COVID-19 pandemic. The Tribunal exercised its discretion to hold the hearing by video. The Tribunal determined it was reasonable to hold a hearing through the Microsoft Teams application, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by telephone. No concerns were expressed by the applicant in regard to the hearing being conducted in this way nor was there any indication that he had any difficulty in understanding and responding to the questions being put. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
6. The Tribunal also received oral evidence from the visa applicant and two of the sponsor's sisters at the second hearing. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages. The review applicant was represented in relation to the review. The applicant's representative also attended the hearings.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

RELEVANT LAW

Whether the parties are in a spouse or de facto relationship

8. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
9. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.

10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

CONSIDERATION OF CLAIMS AND EVIDENCE

Are the parties validly married?

11. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The visa applicant provided a copy of the marriage certificate showing the parties registered their marriage on 23 July 2010 in Vietnam. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

12. Background

13. The sponsor was born in August 1972 and first arrived in Australia in June 1993. Department records confirm that the sponsor was first granted a Subclass 300 (Prospective Marriage visa) in April 1993 and then granted a Subclass 801 Partner visa (Permanent) visa in November 1993. She became an Australian citizen by grant in April 1996.
14. The sponsor declared the following previous relationships:
- a marriage from 24 July 1993 to 7 January 1997.
 - a second marriage from 25 December 1997. She declared that she and her second husband separated in 2001 and divorced on 14 November 2003. She sponsored her second husband for a Partner visa.
 - a de facto relationship from 2003 to end of 2004.
15. The visa applicant was born in March 1969. He is a Vietnamese national. According to Department records the visa applicant and his daughter born in August 2004, who is a dependent child on the visa application, have not previously travelled to Australia.
16. The parties claim to have first met in 2007 and their relationship developed from the following year. They registered their marriage in July 2010.
17. In addition to documentation regarding the sponsor's and applicants' identification, the Tribunal was provided with:
- a. Copies of divorce and marriage certificates
 - b. Relationship statements
 - c. Phone records

- d. Temporary residence evidence
- e. Receipts of two money transfers
- f. A large number of miscellaneous social photographs of the couple together and with family
- g. Copies of invitations to social events and airline tickets
- h. Evidence of airline tickets of the sponsor's travel to Vietnam
- i. Sponsor's hospital records, wedding invitations.

18. Nature of persons' commitment to each other

19. At hearing the sponsor stated the parties met in 2007 and at that time she had no particular feelings for him. She stated that she got to know him in 2008. She stated that it was not love at first sight, but they were in similar circumstances in that she was unhappy with her ex-husband and he was unhappy with his ex-wife. She stated that they had some shared interests like going to the coffee shop and going to see movies and that the visa applicant was very attentive and concerned about her.
20. In discussing the degree of companionship and emotional support the parties provide each other the sponsor told the Tribunal the parties talked about a shared life in Australia and how they want to build their lives together. She stated that he told her about the problems he was having with his business because he was not getting many customers. The Tribunal was told about surgery she required a number of years ago. She explained that this happened around the time the initial application had been refused and that the visa applicant suggested that because she had no one to look after her in Australia that she should have the surgery in Vietnam and that he would care for her.
21. The visa applicant also told the Tribunal that at that time his visa application was rejected, he was disappointed and that he asked the sponsor to have the surgery in Vietnam so she could spend more time in Vietnam.
22. The sponsor stated that the parties talk to each other on Viber. She stated they talk every few days talk usually call in the evenings. The visa applicant provided consistent evidence regarding the manner in which the parties communicate.
23. In relation to any plans for the future the parties have discussed, the sponsor explained what school the visa applicant's daughter will attend in Australia. The sponsor stated that she currently lives in a four-bedroom duplex with her sister and two nieces, and the visa applicant and his daughter would live there too. She stated that this would be a temporary arrangement. The visa applicant's evidence regarding their future planned living arrangements was consistent with that of the sponsor's. He added that he will try to find work so they can move out.
24. The Tribunal accepts the parties first met in 2007 and married in 2010 and notes that the sponsor has travelled to Vietnam regularly since that time until the Covid-19 travel restrictions. The Tribunal also accepts that on those occasions she stayed with the visa applicant. The Tribunal is satisfied that the parties provide each other with a degree of companionship and emotional support and that the visa applicant supported the sponsor following her surgery. The Tribunal accepts that the parties have made some limited future plans together. Overall, the Tribunal is satisfied as to the nature of the parties' commitment to each other.

25. *Financial aspects of the relationship*

26. In submissions to the Tribunal, it was stated that the visa applicant and sponsor currently do not transfer money to each other as they both have an income that is enough for their own living expenses. Evidence was provided of previous money transfers from the sponsor to the visa applicant which occurred in 2016.
27. It was also submitted that the visa applicant financially supports the sponsor's expenses when she travels to Vietnam. In addition, on some occasions he would pay for the sponsor's flights to Vietnam. On other occasions, the sponsor would borrow her sister's money, or she would purchase the tickets with her own savings.
28. In a written submission to the Tribunal, it was requested that little weight be placed against the financial aspects of the relationship due to geographical issues and the fact that both the applicant and sponsor do not permanently live in the one country together.
29. In oral evidence, the sponsor stated that in early November 2021 she commenced working in a vegetarian restaurant. She stated she was working three days a week from 5.00 to 10.00 pm. She stated that she prefers to work full-time, but the restaurant only gives her 15 hours a week. She stated that she had an interview the previous day. The sponsor stated that before the Covid-19 lockdown 2021 she did not work. She explained that in 2016 she travelled back and forwards to Vietnam until 2019. Then she stopped working. In September 2019 she got a job she worked for three months and then she did a resume writing course and how to perform at an interview and how to apply for jobs.
30. In relation to the individual assets the parties have, they provided consistent evidence to the Tribunal. The Tribunal heard that the sponsor has a five-year-old Honda Civic car. The visa applicant has approximately \$AUD 12,000 in savings and runs a noddle store. The Tribunal heard they have no joint debt or other liabilities. The Tribunal also heard consistent evidence that they both contributed to the costs of the sponsor during her visits to Vietnam.
31. The parties do not have any joint ownership of assets or joint liabilities nor do they pool financial resources except in relation to the sharing of day-to-day household expenses when the sponsor has spent time in Vietnam. However, the fact of the current arrangements is not to be considered unusual given the parties live in different countries and given their circumstances. While both the written and oral evidence provided was limited, the Tribunal is prepared to accept the financial aspects of the parties reflect that they are committed to a genuine and continuing relationship.

32. *Nature of the household*

33. In the July 2021 submission provided to the Tribunal it was stated that the applicant and sponsor have shared time together at the applicant's home in Vietnam after they married and every time that she had travelled to Vietnam thereafter.
34. It was submitted that the sponsor has travelled to Vietnam approximately ten times since they were first introduced to each other in 2007. On these visits the sponsor commenced living with the applicant after they registered their marriage (since July 2010). They have cohabitated together in the same household for approximately 14 months in total since 2010.

Her longest stay was approximately six months between the period of September 2016 and March 2017. It was submitted the living arrangement was not a permanent arrangement due to the visa issues and the sponsor had to return to Australia for other work and commitments.

35. The Tribunal heard consistent evidence about the nature of the household during the sponsor's visits to Vietnam to stay with the visa applicant. The evidence included information related to the sponsor's role within the family home during her visits and about the visa applicant's noodle soup store which he runs with siblings as well about his mother and the sponsor's engagement with the second named applicant.
36. The parties provided consistent evidence regarding the second named applicant including about her interests and her academic preferences and interests.
37. During the course of the second hearing the Tribunal put inconsistent evidence to the sponsor in respect of what arrangements had been discussed in relation to the visa applicant's mother. The Tribunal had been told at the first hearing by the sponsor that should the visa applicant be granted a visa, her mother-in-law would live with her younger son and his wife, whereas the visa applicant stated that that his mother would live with his elder sister. In explaining the inconsistency, the sponsor stated that the family had a discussion in 2019 about where the visa applicant's mother would live. She stated that at that time the mother had indicated that said she wants to live with her younger son. The sponsor stated there had been subsequent discussions about her mother-in-law's preference
38. The sponsor and the visa applicant gave consistent evidence that prior to the hearing both parties had contracted Covid. Although they the visa applicant and sponsor had different symptoms, they provided consistent evidence regarding those symptoms. The Tribunal was told that the visa applicant had not thought to update the sponsor that her mother had re-considered her options because it was not a major issue and the family was more concerned about the current Covid situation and dealing with day-to-day matters like the operation of the noodle store.
39. The Tribunal accepts the explanation in relation to the inconsistent evidence previously provided regarding where the applicant's mother will live in the future.
40. The Tribunal has had regard to the sponsor's frequent travel to Vietnam and accept that during her visits she has stayed with the applicant and his family and during those periods she has shared the housework during those visits. The parties had clearly discussed arrangements for the applicant's daughter schooling should the applicant and his daughter be granted a visa. The Tribunal accepts that the nature of the household demonstrates the parties are in a genuine relationship even though it is reflective of the fact they live in different countries.
41. *Social aspects of the relationship*
42. It was submitted that at the time of application the visa applicant and sponsor represented themselves to other people as being in a genuine married relationship with each other and that family and friends and acquaintances were aware of the nature of the relationship and socialised with them as a couple. Reference was made to numerous photographs that had been provided showing the parties with each other and with their friends and families dated from 2010 until now.
43. It was submitted that the sponsor and applicant held their traditional tea ceremony following the registration of their marriage in Ho Chi Minh City on 27 February 2010 and that family members from both sides attended the wedding. Approximately 140 guests attended the

wedding ceremony which was held in 2012. Oral evidence at hearing was consistent with written evidence.

44. At the first hearing the sponsor confirmed that six of her siblings reside in Australia. When asked why none of them would be providing evidence in support of her relationship she responded that three of her elder sisters are old aged 67, 64 and 62 respectively. She stated that in her 2016 Tribunal review they gave evidence. The Tribunal explained that this was a new case. She stated that they were not providing evidence because they are busy with their grandchildren and because they previously provided evidence.
45. During the second hearing, the Tribunal put inconsistent evidence to the sponsor in respect of the first occasion she met members of the applicant's family. At the first hearing she told the Tribunal that she met the visa applicant's applicant mother in 2008 whereas the visa applicant had provided evidence that they met in 2007 the first year the parties met. The sponsor's evidence was that only his mother was there, but the applicant stated that his mother and daughter were in attendance.
46. The sponsor responded that she can confirm that her evidence is correct, but his evidence was confused. She stated that she can confirm that she stayed there until the evening and his nieces came home later during his visit. She stated that the visa applicant's memory is quite poor, and he mixes things up. She referred to having to remind him of various things. In the light of the overall evidence provided the Tribunal is prepared to accept the explanation provided.
47. At the second hearing two of the sponsor's sisters (Thi Thuyet Tran and Thi Tam Tran) gave evidence by telephone.
48. Thi Thuyet Tran stated that she would like to confirm that the parties' relationship is a genuine one. She stated that the reason she can say the relationship is genuine is because she is the one who returns to Vietnam most often. She stated that on each occasion she had returned, the visa applicant visits her and takes her to her parents' grave. She stated that she has taken note that his behavior is very respectful to their late parents. She stated that she has been informed by her nephew that the visa applicant does not only do this when she visits but he goes from time to time and puts incense in front of their photos.
49. Thi Thuyet Tran stated that the sponsor often describes her conversations with the visa applicant to her and that the sponsor is very sad about not being together. She stated that she knows that the parties talk regularly using the Viber app.
50. When asked what she observed when she witnessed the parties together, she stated they travelled to Thailand together including with her. She stated that besides that trip, she saw them together on many other occasions when they have gone for dinner together, or coffee just spent time together at home. She stated that when together she could see from the manner in which they interacted they really care for each other and they showed affection to each other. She stated this she is convinced they are a couple.
51. Thi Thuyet Tran stated that she was at the wedding ceremony. She gave consistent that the official signing of the marriage registration papers occurred prior to and separately from the reception but provided inconsistent evidence in regard to the number of people in attendance at the wedding.
52. Thi Tam Tran stated that she has spent some time with the sponsor and the visa applicant, but she could not recall when it was. She stated that she was there for four weeks and during that time there were a few occasions when they got together. She stated that it was usually in the afternoons when they would go out went out for a drink or a meal. She stated

they are happy couple. They looked out for each other and cared for each other. She noticed that he often got the food for his wife. She stated that when the sponsor was unwell the applicant would get the medication for her and when she was hospitalised, he stayed at her side. She stated that she would see this on the video calls when she called the sponsor to check on her.

53. The witness stated that the parties tend to talk by phone using Viber and that they talk daily or every second day.
54. Based on the oral and documentary evidence the Tribunal accepts that the parties represent themselves to other people as being married to each other and they are regarded as in a genuine relationship by family. It is clear that the persons plan and undertake joint social activities together including travelling overseas together.
55. Having considered all the evidence, the Tribunal is satisfied that the parties have a mutual commitment to a shared life to the exclusion of all others, they are in a genuine and continuing relationship and live together or not separately and apart on a permanent basis. There is nothing before the Tribunal to suggest the parties are related by family.
56. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
57. As the secondary applicant was refused on the basis that the primary applicant did not satisfy the primary criteria and the Tribunal has found that the primary applicant satisfies cl 309.211 and 309.221, it is appropriate that the secondary applicant's application is reconsidered against the secondary criteria.'
58. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

59. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309. 211(1) of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations.

Linda Holub
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).